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No. 99-830

Supreme Court, U.S.
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In The

Supreme Court of the United States

DON STENBERG, Attorney General of the State of Nebraska, et al.,

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. A National Consensus Exists For Banning Partial-Birth/D&X Abortion and the Public Does Not Accept the D&X Procedure as Being Within the Scope of Constitutionally-Protected Conduct 1

II. Nebraska's Ban on Partial-Birth Abortion Serves Legitimate State Interests 2

III. The Absence of a Health Exception Does Not Create an Undue Burden in the Context of a Ban on the Partial-Birth Abortion/D&X Procedure 3

A. The Respondent's Demand For Strict Scrutiny is Inconsistent With *Casey* 3

B. The D&X Procedure is Never Necessary to Preserve the Health of a Woman 4

C. The Respondent's Proposed Standard for Health Exceptions is Inconsistent With the Undue Burden Test as it Would Effectively Institute Abortion on Demand 7

IV. Proper Construction of Nebraska's Partial-Birth Abortion Statute Avoids Vagueness Concerns and Limits Application of the Statute to the D&X Procedure 11

A. The Plain Terms of the Statute Distinguish the Banned Partial-Birth Abortion/D&X Procedure From D&E (Dismemberment) Abortions Due, Among Other Things, to the Requirement of a Separate and Distinct Procedure to Kill the Unborn Child After Partial Delivery 11

TABLE OF CONTENTS – Continued

Page

B. Any Ambiguity in Nebraska's Statute is Eliminated by Application of the Doctrine of Noscitur a Sociis 13

C. The Respondent's Claimed Ignorance as to What Constitutes a D&X Abortion Does Not Make the Statute Vague 17

D. The Chief Law Officer of the State of Nebraska Has Consistently Interpreted the Statute as Encompassing Only the D&X Procedure and Excluding the D&E Procedure 18

E. The Court Should Adopt the Constitutional Avoidance Doctrine Corollaries Proposed by the Amici Curiae States 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Carhart v. Stenberg, 192 F.3d 1142 (8th Cir. 1999)..13, 18

Gustafson v. Alloyd Co., Inc., 513 U.S. 561 (1995) 15

Gutierrez v. Ada, ___ U.S. ___, 120 S. Ct. 740 (2000) 15

Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999)..... 10

Little Rock Family Planning Services, P.A. v. Jegley, 192 F.3d 794 (8th Cir. 1999)..... 15

Mazurek v. Armstrong, 520 U.S. 968 (1997) 8

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 7, 8

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)..... 2, 3, 4, 9, 10, 20

Planned Parenthood of Wisconsin v. Doyle, 44 F. Supp.2d 975 (W.D. Wis. 1999), *vacated on other grounds*, 195 F.3d 857 (7th Cir. 1999) 5

Roe v. Wade, 410 U.S. 113 (1973) 1, 3, 8, 10, 11

Stenberg v. Moore, 602 N.W.2d 465 (Neb. 1999)..... 14

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), *overruled*, 505 U.S. 833 (1992) 1, 8, 10

U. S. v. Morton, 467 U.S. 822 (1984)..... 14

Washington v. Glucksberg, 521 U.S. 702 (1997) 1

TABLE OF AUTHORITIES – Continued

Page

Wharton v. Wise, 153 U.S. 155 (1894) 15

Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997), *cert. den.*, 523 U.S. 1036 (1998) 19

STATUTES

Neb. Rev. Stat. § 28-326(9) 11, 12, 14, 16

Neb. Rev. Stat. § 28-336 16

Partial-Birth Abortion Ban Act of 1995, H.R. 1833, 105th Cong. (1995) 5

ARGUMENT

I. A National Consensus Exists For Banning Partial-Birth/D&X Abortion and The Public Does Not Accept the D&X Procedure As Being Within The Scope of Constitutionally-Protected Conduct.

The Respondent opens his brief with the Orwellian declaration that "All available evidence refutes the State's assertion that the public supports the nationwide campaign to ban 'partial-birth abortions.' " Brief of Resp. at 1 n.1. On the contrary, large bi-partisan majorities consisting of both pro-choice and pro-life legislators have voted to ban the procedure in thirty States and both houses of Congress (as recently as April 6, 2000 in the U.S. House of Representatives). As this Court has stated, " '[T]he primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws.' " ***Washington v. Glucksberg,*** 521 U.S. 702, 711 (1997) (bracketed material in original) (quoting ***Stanford v. Kentucky,*** 492 U.S. 361, 373 (1989)).

Not only is there a national consensus among elected state and federal legislators, but the general public clearly does not view the partial-birth abortion procedure as falling within the liberty right protected by ***Roe v. Wade*** and ***Casey***. A Wirthlin poll found that 73% of Americans favored banning partial-birth abortion when they were presented a brief general description of the procedure. Wirthlin Worldwide Poll, Nov. 3, 1998. Even when the question posed did not provide a description of the procedure, 64% of Americans favored banning partial-birth abortion in a 2000 Gallop Poll. ***See*** www.gallup.com/poll/indicators/indabortion.asp (Jan. 13-16, 2000). ***See also*** Brief of Amicus Curiae Agudath Israel at 10.

Given the public's overwhelming revulsion with partial-birth abortion, a determination that partial-birth abortion is a constitutionally protected activity would clearly not be accepted as "a common mandate rooted in

the Constitution." ***See Planned Parenthood of Southeastern Pennsylvania v. Casey,*** 505 U.S. 833, 867 (1992).

II. Nebraska's Ban on Partial-Birth Abortion Serves Legitimate State Interests.

The Respondent relies heavily on the asserted proposition that the only legitimate interests which a State may assert in the context of abortion regulations are maternal health and preserving "potential" life by dissuading women from having an abortion. Brief of Resp. at 35-39. However, there are additional legitimate State interests here, including the State's compelling interest in erecting a barrier to infanticide and the State's interest in showing respect for the "potential" life of the living unborn child. *See* Brief of Pet. at 48-49.

The advent of doctors killing human infants who are mostly outside the womb and dangling just inches from complete birth is a fundamental change in circumstances, ***Casey,*** 505 U.S. at 863-864, which gives rise to State interests not heretofore discussed by the Court. ***See*** Brief of Pet. at 29-30 (discussing the changed "factual underpinnings" since ***Casey,*** and specifically the public's understanding of what constitutes an abortion). ***See also*** Brief of Amici Curiae Congressman Canady, et al. at 22-29 (discussing the States' interest in protecting partially-born children); Brief of Amicus Curiae Family Research Council at 5-18 (discussion of the States' interest in preventing infanticide); Brief of Amici Curiae States of Louisiana and Mississippi at 14-19; Brief of Amici Curiae Association of American Physicians and Surgeons, et al. at 27-28 (States' interest in preserving the integrity of the medical profession).

The Respondent claims that "Banning a particular procedure before viability when others remain available serves no interest in potential life. . . . " Brief of Resp. at 37. The Respondent's position, however, falsely assumes the Court is constitutionally bound to turn a deaf ear and

a blind eye to the nationwide gasp of horror at a procedure whereby near-viable living infants are literally pulled from the womb and, with legs kicking and fingers clasping, have their skull pierced and their brains suctioned from their head while poised at the very precipice of personhood. ***See*** Brief of Pet. at 3-4. As pro-choice Senator Daniel Patrick Moynihan stated, in explaining his vote to override a presidential veto of a congressional ban on partial-birth abortion, "the procedure was too close to infanticide. . . . And now we have testimony that it is not just too close to infanticide, it is infanticide, and one would be too many." Brief of Amici Curiae Congressman Canady, et al. at 17 (quoting Congressional Quarterly, March 15, 1997). A nation so callous or cavalier as to recognize "no legitimate interest" in stopping such a procedure cannot rightly be called civilized. Our Constitution was not drafted by such people, and the history of the Fourteenth Amendment does not support its use as a means of legitimizing such atrocity in the name of "liberty." ***See*** Brief of Resp. at 29-39.

III. The Absence of a Health Exception Does Not Create an Undue Burden in the Context of a Ban on the Partial-Birth Abortion/D&X Procedure.

A. The Respondent's Demand for Strict Scrutiny is Inconsistent With *Casey*.

In order to address the health exception aspect of this case, it must first be determined what standard of review applies. Eight years ago this Court held that state abortion regulations would be upheld "which in no real sense deprived the woman of the ultimate decision" to terminate a pregnancy prior to fetal viability. ***Casey,*** 505 U.S. at 875. The Court expressly abandoned the prior legal framework, which had not fulfilled ***Roe's*** promises regarding the interests of the States, and adopted the

undue burden test. *Id.* at 876. In disregard of this decision, the Respondent now asserts that any state legislation which restricts "the *means* by which a woman terminates her pregnancy before viability" continues to be subject to "strict scrutiny . . . requiring that such restrictions be narrowly tailored to serve a compelling State interest in order to survive constitutional review." Brief of Resp. at 30-31. The Respondent's proposed standard of review would overrule *Casey*, and would significantly undervalue the interests of the State.

B. The D&X Procedure is Never Necessary to Preserve the Health of Women.

The absence of a health exception in the statute does not create an undue burden since the D&X procedure is never necessary to preserve the health of women. The Respondent and amicus curiae ACOG are unable to articulate any concrete category of situations where the D&X procedure would be necessary to preserve the health of women. The only specific situations suggested where a D&X procedure may even be "the most appropriate abortion method" are 1) where the infant has hydrocephalus; 2) where "intactness [of the body] allows unhampered evaluation of structural abnormalities"; and 3) where "an intact fetus can aid . . . patients grieving a wanted pregnancy by providing the opportunity for a final act of bonding." Brief of Amicus Curiae ACOG at 23. First of all, the modern induction procedure would satisfy any need to have an intact child and would also be superior for bonding. More importantly, though, facilitating parental bonding with a dead child and facilitating autopsies are not interests which outweigh the State's compelling interests in the child. Thus, the only facially plausible situation proposed by the Respondent in which the D&X procedure could be necessary in order to preserve a woman's health is when the child has hydrocephalus.

However, the record is clear on this question, and it contradicts the Respondent's claim.

The State presented testimony by one of the country's leading experts on this question, Dr. Frank Boehm. J.A. 561-598. Dr. Boehm's practice includes second trimester abortions, including abortions involving congenital anomaly where there are "serious malformations of the fetus." J.A. 621; Brief of Pet. 40. Dr. Boehm testified that in situations where an unborn child has hydrocephalus he drains away the fluid from the child's head using a procedure called cephalocentesis, and does not need to remove brain tissue. J.A. 700-703 ("if we needed to, we would decompress the head with the cephalocentesis procedure. . . . But our intent is not to cause death with that procedure."). ***See also*** Brief of Amici Curiae Association of American Physicians and Surgeons, et al. at 25-26 (discussion of hydrocephalus and diagnosis of fetal abnormalities); Brief of Amicus Curiae State of Wisconsin at 26-28; Brief of Pet. at 37-38.

Contrary to the assertion of the Respondent, the effect of Nebraska's statute is not to "harm women's health." The physician who developed the D&X procedure, Dr. Martin Haskell, has testified that "the D&X procedure is never medically necessary to . . . preserve the health of a woman." ***Planned Parenthood of Wisconsin v. Doyle,*** 44 F. Supp.2d 975, 980 (W.D. Wis. 1999), *vacated on other grounds,* 195 F.3d 857 (7th Cir. 1999). Likewise, the author of the most widely used textbook on abortion standards and procedures, Dr. Warren Hern, testified to Congress that "he could not imagine a circumstance in which this [D&X] procedure would be safest." Congressional legislative history of the Partial-Birth Abortion Ban Act of 1995, H.R. 1833, 105th Cong. (1995) at 356.

The Respondent's own expert witness, Dr. Stubblefield, acknowledged that it is not "medically-accepted" that D&X is a safer abortion procedure. J.A.

310-311. In fact, no one has ever done any research comparing the safety of D&X to other procedures. J.A. 704. ***See also*** Brief of Amicus Curiae State of Wisconsin at 19-25 (discussing testimony on the safety of D&X vs. D&E). Significantly, official state abortion reporting data shows that in States where bans on partial-birth abortion have been in effect, physicians have not modified their abortion procedures to the detriment of their pregnant women patients. Brief of Amicus Curiae Family First at 21 (summarizing abortion data from states where bans on partial-birth abortion have been in effect).

Interestingly, Dr. Carhart testified that for any abortion over 15 weeks gestation he "intends and prefers to remove the fetus intact by using the intact D&E [D&X] procedure. . . . " Supp.App. at 15. However, he simultaneously maintains that he "does not perform instrumental conversion of the fetus to a footling breech. . . . " Supp.App. at 16. Thus, the Respondent avoided review by the trial court of one of the most controversial aspects of the typical D&X procedure as described by the American College of Obstetricians and Gynecologists (instrumental conversion of the unborn child to a breech or foot-first position). Supp.App. at 15. ACOG implicitly acknowledges that "internal podalic version, in which the physician repositions the fetus into a footling breech. . . . ", Brief of ACOG at 23, is a health risk. ***Id.*** at 24 n.34 ("it is perfectly consistent for Dr. Carhart to conclude . . . that the potential safety advantages of D&X are reduced (and even outweighed) when he must convert the fetus from a transverse or compound presentation.").

Perhaps this explains why even after completion of the trial and submission of all evidence in this case, the Respondent's litigation position with regard to the relative safety of the D&X procedure was only that it was

"likely to be as safe as other abortion methods. . . . "[1] The assertions of the Respondent as to the alleged safety of the D&X procedure became significantly more bold after release of the trial court's opinion. In other words, the Respondent has bootstrapped his safety assertions for the D&X procedure using the district court's findings – findings which went far beyond what the Respondent asked for at trial. ***Id.*** Notwithstanding the overreaching conclusions of the district court, the record shows that safe alternative procedures are available, and a ban on partial-birth/D&X abortion would create no risk to the health of women. ***See*** Brief of Pet. at 40-44.

C. The Respondent's Proposed Standard for Health Exceptions is Inconsistent With the Undue Burden Test as it Would Effectively Institute Abortion on Demand.

After broadly construing Nebraska's statute as a ban on virtually all abortion procedures, the Respondent then relies on this Court's decision in ***Planned Parenthood of Central Missouri v. Danforth,*** 428 U.S. 52 (1976), to argue for its unconstitutionality. Brief of Resp. at 24. However, since Nebraska's statute may reasonably be construed as banning only the D&X procedure, ***See*** section IV, ***infra*** at

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[1] The Respondent argued to the district court in his post-trial brief that, "The evidence from both the preliminary injunction hearing and the trial before this Court establishes two factual predicates for plaintiff's legal arguments. . . . Second, the evidence shows that, even if the Act were construed to prohibit only the D&E procedures in which the fetus is removed intact and the head is decompressed [the D&X procedure] it prohibits *a procedure likely to be as safe as other abortion methods*. . . . " Plaintiff's Post-Trial Brief at 11 (No. 4:97CV3205, D. Neb.) (April 16, 1998) (emphasis added). Thus, the findings of the district court as to the relative safety of the procedure inexplicably went far beyond what the Plaintiff/Respondent himself asserted.

11, the only significance of ***Danforth*** in this case is its reaffirmation of an important component of ***Roe v. Wade*** that is directly applicable here: "*In* ***Roe v. Wade*** the Court . . . emphatically rejected, however, the proffered argument 'that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses.' " ***Danforth,*** 428 U.S. at 60 (quoting ***Roe v. Wade,*** 410 U.S. 113, 153 (1973)) (emphasis added). The Respondent's proposed standard for health exceptions violates this portion of ***Roe.***

The Respondent insists that a health exception is a per se requirement for all statutes regulating abortion. Brief of Resp. at 47. Furthermore, the Respondent maintains that the applicable standard for maternal health considerations remains the "medical trade-off" test employed in ***Thornburgh v. American College of Obstetricians and Gynecologists,*** 476 U.S. 747 (1986), *overruled,* 505 U.S. 833 (1992). Brief of Resp. at 46-48. However, the ***Thornburgh*** "medical trade-off" standard is inconsistent with ***Casey,*** and cannot serve as a guide for what constitutes an "undue burden" since, for the reasons discussed below, its application would effectively prohibit all state regulation of abortion up to and including full-term birth.[2]

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[2] Some lower courts have erroneously concluded that a health exception is required in partial-birth abortion statutes whereby the procedure must be allowed whenever it is theoretically "safer" for the woman than alternative procedures. This is simply another way of asserting that, under the undue burden standard, the relevant inquiry is whether the D&X/ partial-birth abortion procedure is safer than available alternatives. This is an erroneous framing of the issue since the correct test is simply whether there are safe alternative procedures available. ***See, e.g., Mazurek v. Armstrong,*** 520 U.S. 968 (1997) (permitting States to ban non-physician abortions even though some physicians assistants may perform the

Application of a standard that absolutely bars any "trade-off" between maternal health and the well-being of the child would render this Court's decision in ***Casey*** meaningless as to its protection of the States' interests, as it would effectively institute abortion on demand. The State respectfully invites the Court to test this assertion and its underlying premises, discussed below.

The institution of abortion as an absolute right, up through and including full term delivery of a viable healthy child, is necessarily effectuated by the "trade-off" test. This is so because under this analytical framework, a state abortion regulation may never result in the subordination of a woman's "health" to that of the child at any time. The "health" of the woman is considered to be jeopardized or compromised whenever she is required to forego a procedure which would be "safer" than the remaining alternative procedures.

The problem with this approach can be seen in the fact that collapsing a child's skull, prior to the passage of the child's head from the uterus to the birth canal through the cervical os, may arguably make delivery faster and easier since the child's head has the widest diameter of any part of an infant. J.A. 49. If this were true, under the Respondent's proposed legal framework there would be no circumstances under which a State could prohibit any abortion, since even during the birth of a full-term viable healthy child it would be faster and allegedly "safer" for the mother if the doctor removed the brain and collapsed the child's skull before delivering the child's head. For a State to prohibit even such a ghastly and unnecessary procedure would thus result in an

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procedures as or more safely, and less expensively, than some physicians). **See *also Casey,*** 505 U.S. at 883 (upholding statute that resulted in delay in performance of abortions); Brief of Pet. at 33-34, 38. Thus, much of the "health exception" debate is actually an "undue burden" argument.

"impermissible trade-off" between the "health" of the woman and the child, and thereby create an "undue burden" on women by denying them the opportunity to reduce the size of their baby's skull and thereby receive the resulting "health benefits" and increased "safety."

Realizing the implications of the position now advocated by the Respondent herein, the Seventh Circuit concluded, "A requirement of a case-by-case 'health exception' to every statute concerning abortion would amount to a rule that no state may regulate any abortion procedure." ***Hope Clinic v. Ryan,*** 195 F.3d 857, 873 (7th Cir. 1999). In other words, the Respondent's proposed standard would effectively institute abortion on demand, in contradiction of the Court's stated intention in ***Roe v. Wade*** and ***Casey. See also Hope Clinic,*** 195 F.3d at 874 (noting that acceptance of the position now advocated by the Respondent herein "would amount to a rule that anything goes.").

The Respondent's proposed interpretation of the undue burden standard, under which any marginal decrease in risk to the mother (or in this case, alleged theoretical or potential decrease in risk) can justify abortion at any stage of development, flies in the face of ***Casey's*** conclusion that prior caselaw (**i.e. *Thornburgh***) "undervalues the State's interest in potential life." ***Casey,*** 505 U.S. at 873. While maternal safety is obviously the largest and most important factor which courts consider, it does not automatically trump all other considerations in marginal cases, as the Respondent argues. ***See Casey,*** 505 U.S. at 880 (upholding a statute which contained exceptions for medical emergencies that are effective only where the delay caused by the statute would result in "significant" threats to the life or health of the woman.). Moreover, the absence of a health exception clearly does not affect a "large fraction" of women obtaining partial-birth abortions. ***See*** Brief of Amici Curiae National Right to Life, et al. at 21-25.

In sum, if any "trade-off" between maternal "health" and the well being of the child is impermissible, and if collapsing a child's skull prior to delivery makes the delivery faster and allegedly "safer" for the mother, then it necessarily follows that we have abortion on demand up through and including full-term birth itself. The State of Nebraska, and indeed the majority of all States, as well as overwhelming majorities of both houses of Congress, are saying this is wrong. Abortion is not an absolute right. ***Roe v. Wade,*** 410 U.S. at 153.

IV. Proper Construction of Nebraska's Partial-Birth Abortion Statute Avoids Vagueness Concerns and Limits Application of the Statute to the D&X Procedure.

A. The Plain Terms of the Statute Distinguish the Banned Partial-Birth Abortion/D&X Procedure from D&E (Dismemberment) Abortions Due, Among Other Things, to the Requirement of a Separate and Distinct Procedure to Kill the Unborn Child After Partial Delivery.

The Respondent asserts that "The Act does not require, as the State now urges, that the procedure that kills the fetus be a separate death-causing procedure." Brief of Resp. at 23. "Adding such a requirement would entail impermissibly rewriting the Act." ***Id.***

The insistence of the Respondent that there is no "separate death-causing procedure" requirement in the statute is unfounded. In describing the banned procedure, the statute states two times, in plain English, "*partially delivers* vaginally a living unborn child ***before killing*** the unborn child *and completing the delivery.*" Neb. Rev. Stat. § 28-326(9) (emphasis added). Thus, the separate and distinct nature of the death-causing procedure ("*a procedure* that the person performing such procedure *knows will kill* the unborn child *and does kill* the unborn child") (emphasis added) is plain and unambiguous on

the face of the statute. *Id.* Similarly, the sequencing requirement (partial vaginal delivery of a living unborn child, followed by a separate death-causing procedure) is not reasonably subject to debate. It is clear on the face of the statute: "Partial-birth abortion means . . . partially delivers vaginally a living unborn child *before killing* the unborn child and completing the delivery." *Id. See also* Brief of Amicus Curiae State of Wisconsin at 15.

The elements of the banned method of abortion include the deliberate and intentional 1) partial delivery of a living unborn child vaginally for the purpose of performing a separate death-causing procedure; 2) killing the unborn child by the separate procedure after its partial-delivery; and 3) completing the delivery. In contrast to a D&E abortion, where "[c]ontinuing disarticulation of fetal parts eventually kills the fetus," Brief of Amicus Curiae ACOG at 5, the statute requires that the banned procedure entail "a procedure that the person performing such procedure *knows will kill* the unborn child *and does kill* the unborn child." Neb. Rev. Stat. § 28-326(9). No method of abortion except the D&X procedure meets these statutory criteria, and thus no other method of abortion is banned by the statute.[3]

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[3] The U.S. asserts that "The statute makes abortion illegal unless fetal demise occurs before any 'substantial portion' of the fetus emerges into the vagina." Brief of Amicus Curiae U.S. at 10 (emphasis added). This interpretation ignores the plain language of the statute. By its express terms, the only conduct that violates the statute is "deliberately and intentionally delivering into the vagina a living unborn child or a substantial portion thereof, for the purpose of performing a procedure that . . . will kill the unborn child and does kill the unborn child." Neb. Rev. Stat. § 28-326(9). *See* Brief of Pet. at 14. Thus, as discussed above, the partial delivery of a living unborn child must be for the purpose of performing a separate and subsequent death-causing procedure. *See* Brief of Pet. at 14; 16-18. The U.S. equates the language of the statute regarding the death-causing procedure with merely "causing fetal demise." Brief of Amicus Curiae U.S. at 11. This construction also ignores the plain language of the statute, not to mention basic considerations of federalism as reflected in rules of statutory construction and the doctrine of constitutional avoidance. *See* Brief of Amici Curiae States of Virginia, et al. The language which the U.S. uses to craft its broad reading of the statute cannot be read in such a manner due to the context created by other terms in the statute, as discussed in section IV.B, *infra*.

B. Any Ambiguity in Nebraska's Statute is Eliminated by Application of the Doctrine of Noscitur a Sociis.

The Eighth Circuit expressly found that the "medical description [of the D&X abortion procedure] is within the definition of partial-birth abortion contained in the Nebraska Statute. . . . " *Carhart v. Stenberg*, 192 F.3d 1142, 1145 (8th Cir. 1999) (Pet. App. 4-5). The disputed point before the Court is whether, as Respondent contends, the statute also encompasses the D&E (dismemberment) abortion procedure. The basis for the Respondent's argument is the alleged ambiguity of the phrase "substantial portion" in the statute's definition of "partially delivers vaginally a living unborn child before killing the unborn child."[4] Nebraska's statute provides: "For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for

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[4] The assertion of the Respondent that dismemberment in a D&E abortion takes place outside the uterus appears to be a semantical innovation designed to attack the statute. For example, Dr. Martin Haskell's D&X monograph states unequivocally that "Classic D&E is accomplished by dismembering the fetus inside the uterus with instruments and removing pieces through an adequately dilated cervix." Brief of Amici Curiae Congressman Canady, et al., at App. 2 (setting forth the Haskell D&X monograph in its entirety).

the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child." Neb. Rev. Stat. 28-326(9).

When isolated from its context, the term "substantial portion" is clearly subject to varying interpretations. However, the Respondent's calculated attempt to undermine the statute on this basis violates basic canons of statutory construction. The term cannot properly be construed in isolation from the rest of the statute. In ***U. S. v. Morton,*** 467 U.S. 822, 828 (1984), the Court stated, "If we were to look at the words "competent jurisdiction" in isolation, we would concede that the statute is ambiguous. . . . We do not, however, construe statutory phrases in isolation; we read statutes as a whole." ***Id.*** This same holistic approach to reading the challenged statute is required by Nebraska law. ***Stenberg v. Moore,*** 602 N.W.2d 465, 472 (Neb. 1999) ("In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute. . . . ").

As discussed in detail in the main Brief of Petitioners (pp. 13-21), the language of the statute when read in its entirety does not proscribe any method of abortion except the D&X procedure. Any ambiguity as to the meaning of "substantial portion" is eliminated by application of the rule of statutory construction known as *noscitur a sociis*:

> It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments. **Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.**

Wharton v. Wise, 153 U.S. 155, 169 (1894) (emphasis added). ***See also Gutierrez v. Ada,*** ___ U.S. ___, 120 S.Ct. 740, 744 (2000) ("words and people are known by their companions."); ***Gustafson v. Alloyd Co., Inc.,*** 513 U.S. 561, 575 (1995) ("This rule we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words. . . . ").

Here, the term "substantial portion" is "restrained" from encompassing D&E (dismemberment) abortions "by reference to the object" of the statute: "partial-birth" abortion. ***Wharton,*** 153 U.S. at 169; ***Little Rock Family Planning Services, P.A. v. Jegley,*** 192 F.3d 794 (8th Cir. 1999) ("The term 'partial-birth' abortion . . . is *commonly understood* to refer to a *particular procedure* known as intact dilation and extraction (*D&X*).") (emphasis added). Any remaining doubt about the meaning of the term is resolved by reference to its companion terms which eliminate D&E from the statute's coverage. ***See*** Brief of Pet. at 15-21 (discussing the terms "partially delivers vaginally" and "procedure that . . . will kill the unborn child").[5]

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[5] The suction curettage procedure is eliminated by reference to the plain terms of the statute. "Partially delivers vaginally . . . before killing the unborn child" and "delivering into the vagina" cannot reasonably refer to suctioning an intact embryo or pieces of an unborn child through a plastic tube as alleged by the U.S. ***See*** Brief of U.S. at 12. It would indeed be absurd to conclude that passage of an embryo or unborn child through a tube, either whole or in pieces, constitutes "delivering into the vagina." The unborn child in such a procedure never even touches the birth canal itself and is certainly not delivered "into the vagina" in any rational sense. In light of the plain language of the statute requiring delivery "into the vagina," the argument of the Respondent and the U.S. that the statute bans suction curettage abortions is specious and demonstrates the strained nature of their statutory construction arguments in general.

As discussed in the main Brief of Petitioner at 25 n.10, if the Court, following oral argument, has any

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Likewise, an induction procedure does not entail delivering into the vagina a living unborn child for the purpose of killing the child and completing the delivery. The Respondent and his amici may claim cutting the umbilical cord is sufficient to satisfy the statute's requirements. However, the cutting of the umbilical cord is not a death causing procedure under the terms of the statute. The death causing procedure must occur after "partial vaginal delivery" and before "completing the delivery." Neb. Rev. Stat. § 28-326(9). In an induction, the cord may theoretically be cut before the procedure begins, *see, e.g.*, J.A. 57, or after the child is delivered. It is not practical to cut the cord after the child is partially delivered. *Id.*; J.A. 131-132. Furthermore, the scienter requirements in the statute exclude inductions.

A "head-first" procedure involving delivery of a living unborn child into the vagina followed by killing the child is not within the contemplation of the statute. The intent of the statute is to ban only the D&X procedure. Head-first delivery followed by a death-causing procedure is not a recognized procedure in any event. Once the head is through the cervical os, the whole child will quickly follow since the head has the largest diameter of any part of a newborn. J.A. 49. As Dr. Carhart admitted "Once you've passed the internal os of the cervix, then you're out." J.A. 106. Thus, there would be no medical reason to kill the child once the head is out, and there is no recognized medical procedure where this is done. Consequently, such a procedure, if it existed, would already be prohibited under current Nebraska law. Neb. Rev. Stat. § 28-336 (1995) ("The performing of an abortion by using anything other than accepted medical procedures is a Class IV felony."). The whole basis for the D&X procedure is that the head is sometimes too big to fit through the cervical os without additional dilation. Therefore, if the head is being punctured in a head-first presentation, it is being done by reaching into the uterus; not after delivery of a living unborn child or a substantial portion thereof into the birth canal. ***See*** J.A. 48 (skull is pierced by reaching "through the cervical os."). ***See also*** J.A. 271 (testimony of Respondent's witness

unresolved questions regarding the proper interpretation of the scope or application of the statute, the Court could certify those questions to the Nebraska Supreme Court.

C. The Respondent's Claimed Ignorance as to What Constitutes a D&X Abortion Does Not Make the Statute Vague.

The Respondent, as well as numerous other plaintiffs nation-wide, have spent the past several years telling federal courts that bans on partial-birth abortion are unconstitutional because they do not know what the term means. They insist there is no such procedure as partial-birth abortion, and that the proper medical term is "D&X abortion." Now, the Respondent tells this Court a ban on D&X abortion would be "equally vague." Brief of Resp. at 49 n.50. According to the Respondent, a ban on D&X abortions "leaves physicians to guess exactly which abortions are prohibited." ***Id.*** Thus, after having insisted throughout years of litigation that the D&X procedure is a medically-recognized, and medically-accepted abortion procedure, the Respondent now asserts a ban on D&X abortion "is too vague to pass constitutional muster, for it does not define with adequate precision what the State means by a 'D&X' abortion." Brief of Resp. at 29 n.35. This anticipated argument is one reason why the drafters of the statute did not expressly ban "D&X abortion," or "intact D&E abortion," but instead described the D&X procedure and labeled it with the descriptive term "partial-birth" abortion. Nonetheless, the D&X procedure is a distinctive abortion technique which is distinguishable from the D&E procedure and other abortion procedures.

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distinguishing a head-first procedure from a partial-birth abortion). The statute simply does not apply to such a procedure.

See Brief of Amici Curiae Association of American Physicians and Surgeons, et al. at 5-12 (discussion of the distinctive nature of the D&X procedure); Brief of Amicus Curiae State of Wisconsin at 4-15.

D. The Chief Law Officer of the State of Nebraska has Consistently Interpreted the Statute as Encompassing Only the D&X Procedure and Excluding the D&E Procedure.

The Respondent's characterization of the State's interpretation of the statute as having recently evolved is simply incorrect. *See, e.g.*, Brief of Resp. at 25 ("The Act, as most recently construed by the State, would prohibit Dr. Carhart from performing . . . the D&X procedure."). In support of his characterization, the Respondent repeatedly cites to a brief submitted to the district court at a preliminary injunction hearing in July of 1997. *See* Brief of Resp. at 18 n.22.

The brief in question is not in the record in this proceeding, and the meaning ascribed to the quoted statements is a gross mischaracterization. The Attorney General has long recognized that "partial-birth" abortion refers specifically to the D&X abortion procedure. *See* J.A. 545-548 (Op. Att'y Gen. No. 96043). The record in this case, both at the trial level and in the Eighth Circuit, is clear as to the State's construction of the statute. The chief law officer of the State has interpreted the statute as encompassing only the D&X procedure, and excluding the D&E procedure.[6] *Carhart v. Stenberg*, 192 F.3d 1142,

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[6] At the time of the preliminary injunction hearing, Dr. Carhart referred to the banned procedure as "Intact D&E," while the district court referred to the "Haskell D&X." There is no dispute that these terms are both encompassed by what is known medically as the D&X abortion procedure. *See* Brief of Amicus Curiae ACOG at 6 (acknowledging that "D&X," "intact D&X," and "intact D&E" are all interchangeable terms). *See also* Brief of Amici Curiae Association of American Physicians and Surgeons, et al. at 9-12, 28-30 (discussion of the development of the term "D&X").

1150 (8th Cir. 1999) (Eighth Circuit's statement that "The State argues that LB 23's ban on partial-birth abortion prohibits only the D&X procedure, and not the D&E."); Pet.App. 16; R.Tr. 28 (Eighth Cir. App. 296) (statement by the district court that "it's the State's position that D&E is not prohibited; D&X is prohibited").

E. The Court Should Adopt the Constitutional Avoidance Doctrine Corollaries Proposed by the Amici Curiae States.

The State of Virginia, joined by numerous other States as amici curiae, has proposed two corollaries to the doctrine of constitutional avoidance. The Court should adopt these corollaries in order to redress the failure of the lower federal courts to properly apply the doctrine of constitutional avoidance, so as to uphold fundamental aspects of the federal-state relationship. Brief of Amici Curiae States of Virginia, et al. at 20-29. *See also* Brief of Pet. at 23-28.

Application of the "Reasonable Jurist" Corollary and/or the "State Certification Corollary," would result in adoption of the State's narrow construction of the statute and reversal of the Eighth Circuit Court of Appeals. *See* Brief of Amici Curiae States of Virginia, et al. at 24-26. The Petitioners strongly urge the Court to adopt and apply these corollaries in order to preserve the proper role of the States in our Union and to ensure proper application of the doctrine of constitutional avoidance.

The present case is just the latest example of the need for this action by the Court. *See Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 218 (6th Cir. 1997) (Boggs, dissenting), *cert. den.*, 523 U.S. 1036 (1998) ("The

post-*Casey* history of abortion litigation in the lower courts is reminiscent of the classic recurring football drama of Charlie Brown and Lucy in the *Peanuts* comic strip. Lucy repeatedly assures Charlie Brown that he can kick the football, if only *this time* he gets it just right. Charlie Brown keeps trying, but Lucy never fails to pull the ball away at the last moment."). Contrary to basic tenets of federalism, as reflected in fundamental rules of statutory construction, Brief of Pet. at 24-26, the lower federal courts have all too often failed to give the States the benefit of the doubt in cases where plaintiffs claim confusion about abortion statutes. Only this Court can set the proper tone for appropriate deference to State legislation in this area.

CONCLUSION

Nebraska's ban on partial-birth/D&X abortion can reasonably be construed as not encompassing the more common D&E abortion procedure, thereby leaving women a safe alternative procedure and avoiding the creation of an undue burden on the right to choose whether to terminate a pregnancy. In accordance with cardinal rules of construction and fundamental principles of federalism, and in recognition of the State's legitimate interests, the Court should reverse the decisions below and affirm the authority of the Nebraska Legislature to ban the partial-birth abortion/D&X procedure.

Respectfully submitted,

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